

STATE OF MICHIGAN
IN THE SUPREME COURT

TAMMY McNEIL-MARKS,

Plaintiff/Appellee,

v.

MIDMICHIGAN MEDICAL
CENTER-GRATIOT,

Defendant/Appellant.

Supreme Court No. 154159
Court of Appeals No. 326606
Circuit Court No. 14-011876-NZ
Hon. Randy L. Tahvonen

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PLAINTIFF/APPELLEE'S SUPPLEMENTAL BRIEF

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS.....	i
INDEX OF AUTHORITY.....	ii
INTRODUCTION	1
SUPPLEMENTAL ARGUMENT.....	2
RELIEF SOUGHT	10

INDEX OF AUTHORITY

Cases

<u>Brown v. Mayor of Detroit</u> , 478 Mich. 589, 734 N.W.2d 514 (2007)	4, 5
<u>Chandler v. Dowell Schlumberger Inc.</u> , 456 Mich. 395, 406, 572 N.W.2d 210, 215 (1998)	2
<u>Goldfarb v. Virginia State Bar</u> , 421 U.S. 773, 792, 95 S. Ct. 2004, 2016, 44 L. Ed. 2d 572 (1975)	7
<u>Grievance Adm'r v. Fieger</u> , 476 Mich. 231, 244, 719 N.W.2d 123, 133 (2006)	7
<u>Passmore v. Passmore's Estate</u> , 50 Mich. 626, 627, 16 N.W. 170 (1883)	2
<u>Ravary v. Reed</u> , 163 Mich. App. 447, 453, 415 N.W.2d 240, 243 (1987)	2
<u>Shaw v Ecorse</u> , 283 Mich App 1, 8, 770 NW2d 31 (2009)	4
<u>Whitman v. City of Burton</u> , 493 Mich. 303, 318-319, 831 N.W.2d 223, 232-233 (2013)	6, 10

Statutes

MCL § 750.411h	9
MCL § 750.411i	9
MCL. § 15.361	5

Rules

MCR 9.103 (A)	6
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INTRODUCTION

This Court has asked the parties to further brief the issue by filing supplemental briefs:

On April 12, 2017, the Court heard oral argument on the application for leave to appeal the June 16, 2016 judgment of the Court of Appeals. On order of the Court, the application is again considered. We DIRECT the parties to file additional supplemental briefs within 42 days of the date of this order addressing whether the communication from the plaintiff to her attorney regarding Marcia Fields' presence at MidMichigan Medical Center-Gratiot amounted to a "report," as that word is used in Section 2 of the Whistleblowers Protection Act (WPA), MCL 15.362. In answering this question, the parties shall, at a minimum, address whether: (1) the plaintiff's communication must be to an individual with the authority to address the alleged violation of law; (2) the WPA requires that a plaintiff employee specifically intend to make a charge of a violation or suspected violation of law against another; and (3) privileged communications between a client and his or her attorney can constitute a report under the WPA.

(July 7, 2017, Supreme Court Order).

The Plaintiff hereby submits the following as a supplement to her response to Defendant's application. As this Court has stated on more than one occasion, the Whistleblowers Protection Act is a remedial statute that was intended to benefit those employees that are engaged in a protected activity:

The WPA, as a remedial statute, is to be liberally construed to favor the persons the Legislature intended to benefit. Shallal, supra at 611, 566 N.W.2d 571. The Whistleblowers' Protection Act was intended to benefit those employees engaged in "protected activity" as defined by the act. The act protects those who report or are about to report violations of a law, regulation, or rule to a public body. It protects those requested by a public body to participate in an investigation. Because one who engages in no "protected activity" under the act is not intended to benefit from its operation, our decision

does not affect the remedial nature of the act. Instead, we reaffirm the broad protection given to those employees who engage in protected activity, and merely recognize that not all employees are covered.

Chandler v. Dowell Schlumberger Inc., 456 Mich. 395, 406, 572 N.W.2d 210, 215 (1998).

SUPPLEMENTAL-ARGUMENT

I. THE PLAINTIFF WAIVED THE ATTORNEY CLIENT PRIVILEGE REGARDING HER COMMUNICATION WITH ATTORNEY RICHARD GAY, AND, AS SUCH, THE ATTORNEY CLIENT PRIVILEGE DOES NOT APPLY IN THE PRESENT CASE.

An individual can waive the attorney-client privilege. See Ravary v. Reed, 163 Mich. App. 447, 453, 415 N.W.2d 240, 243 (1987), see also Passmore v. Passmore's Estate, 50 Mich. 626, 627, 16 N.W. 170 (1883).

It is respectfully submitted that the above-captioned case involves the unique situation wherein the employee, i.e. the Plaintiff, waived the attorney client privilege which may have otherwise applied to the communication between herself and attorney Richard Gay. Brenda Whitman, Defendant's Director of Nursing, testified that Plaintiff shared her discussions with attorney Richard Gay with Ms. Whitman. (**Exhibit 1** – Whitman Deposition at 8-9 & 17).

In fact, the Defendant has taken the position that Plaintiff's employment with the Defendant was terminated because she had shared her discussions with attorney Richard Gay with Defendant's agents. (**Exhibit 2** – Broudbek Deposition at 21-25).

It is respectfully submitted that normally an employer would not be privy to the

existence of discussions between an employee and that employee's attorney due to the attorney-client privilege; however, the Defendant was made aware of the discussions in the present case because of a decision made by the Plaintiff to waive the privilege. As such, the attorney client privilege does not apply to the communications at issue in the present case.

Even though the attorney client privilege does not apply in the present case, the Court has directed the parties to address the issue of whether or not a privileged communication between a client and his or her attorney can constitute a report under the Whistleblowers Protection Act.

It is submitted that the Whistleblowers Protection Act does not contain language limiting the protection to only those reports made in an unprivileged setting; however, it is difficult to envision a scenario wherein a privileged communication between a client and an attorney would result in a retaliatory discharge under the Whistleblowers Protection Act, since the employer would normally not be privy to privileged report unless the privilege was waived by the client.

As the Court is aware, one of the elements of the *prima facie* case under the Whistleblowers Protection Act is causation. To establish a *prima facie* case of retaliation under the Act, a plaintiff must show (1) that the plaintiff engaged in protected activity as defined by the Act; (2) that the plaintiff was discharged or discriminated against; and (3) a causal connection exists between the protected activity and the discharge or adverse employment action. Shaw v Ecorse, 283 Mich

App 1, 8, 770 NW2d 31 (2009). In other words, evidence needs to exist that the Defendant was aware of the report as part of the *prima facie* case. Shaw v Ecorse, 283 Mich App 1, 8, 770 NW2d 31 (2009).

In the present case, the Defendant learned of the report by virtue of the fact that Plaintiff waived the attorney-client privilege.

II. EVEN THOUGH AN ATTORNEY HAS AUTHORITY, THERE IS NO STATUTORY REQUIREMENT THAT THE COMMUNICATION MUST BE MADE TO AN INDIVIDUAL WITH THE AUTHORITY TO ADDRESS THE ALLEGED VIOLATION OF THE LAW.

There is also no statutory requirement that the member of a public body must have authority to address the alleged violation of the law. This Court has rejected arguments that a report must be made to a higher authority or to an outside agency. In Brown v. Mayor of Detroit, 478 Mich. 589, 734 N.W.2d 514 (2007), the whistleblower reported, in part, allegations of illegal conduct and misconduct by Detroit Mayor Kwame Kilpatrick and his wife to the police department's Professional Accountability Bureau.

Neither the mayor nor his wife was employees of the police department and arguments were made that the report to the police department's Professional Accountability Bureau was insufficient because the whistleblower did not make the report to an agency outside of the police department and did not make the report to a higher authority. This Court disagreed concluding:

The language of the WPA does not provide that this public body must be an outside agency or higher authority. There is no condition in the statute

that an employee must report wrongdoing to an outside agency or higher authority to be protected by the WPA. In this case, Nelthroe and Brown reported their allegations of suspected violations to a public body. Nelthroe reported the suspected violations to the police department's Professional Accountability Bureau, and Brown reported the suspected violations to the chief of police. A "public body" includes a "law enforcement agency or any member or employee of a law enforcement agency." MCL 15.361(d)(v). It does not matter if the public body to which the suspected violations were reported was also the employee's employer.

Brown v. Mayor of Detroit, 478 Mich. 589, 594–95, 734 N.W.2d 514, 517 (2007).

Nowhere in the Whistleblowers Protection Act does the statutory protection hinge upon the qualifications or authority of the public body or even the qualifications or authority of a member of that public body. As an illustrative example, the definitions provided by the state legislature do not mandate that the report be made to an individual or public body with the authority to act. MCL. § 15.361.

To limit the statutory protection to reports to only those members of public bodies that are later deemed to have actual authority to address the alleged violation of the law in that particular situation would have a chilling effect upon whistleblowers. Whistleblowers would be forced to second guess and speculate on whether or not his or her report to a member of a public body will later be deemed to be an individual and/or public body with the authority to address the alleged violation of the law under the specific circumstances which existed in that situation.

In other words, the limitation would serve as a barrier. As noted by this Court previously, the objective of the Whistleblowers Protection Act is to remove barriers

that may interfere with an employee's efforts to report violations or suspected violations of the law. Whitman v. City of Burton, 493 Mich. 303, 318-319, 831 N.W.2d 223, 232-233 (2013). This Court explained:

However, this Court has explained that the WPA meets its objective of protecting the public by protecting the whistleblowing employee and by removing barriers that may interdict employee efforts to report violations or suspected violations of the law. Without employees who are willing to risk adverse employment consequences as a result of whistleblowing activities, the public would remain unaware of large-scale and potentially dangerous abuses.

Whitman v. City of Burton, 493 Mich. 303, 318-19, 831 N.W.2d 223, 232-33 (2013).

Regardless, an attorney is an officer of the court as stated in the Michigan Court Rules with an obligation to aid in the administration of justice:

(A) General Principles. The license to practice law in Michigan is, among other things, a continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and counselor and as an officer of the court. It is the duty of every attorney to conduct himself or herself at all times in conformity with standards imposed on members of the bar as a condition of the privilege to practice law. These standards include, but are not limited to, the rules of professional responsibility and the rules of judicial conduct that are adopted by the Supreme Court.

MCR 9.103 (A).

Both this Court and the United States Supreme Court has noted that attorneys serve as officers of the court with the power and obligation to aid courts in the administration of justice:

As an officer of the court, a member of the bar enjoys singular powers that others do not possess; by virtue of admission, members of the bar

share a kind of monopoly granted only to lawyers. Admission creates a license not only to advise and counsel clients but also to appear in court and try cases; as an officer of the court, a lawyer can cause persons to drop their private affairs and be called as witnesses in court, and for depositions and other pretrial processes that, while subject to the ultimate control of the court, may be conducted outside courtrooms. The license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice. [*In re Snyder*, 472 U.S. 634, 644–645, 105 S.Ct. 2874, 86 L.Ed.2d 504 (1985).]

Grievance Adm'r v. Fieger, 476 Mich. 231, 244, 719 N.W.2d 123, 133 (2006).

The United States Supreme Court has explained that attorneys are essential to the primary governmental function of administering justice:

The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been ‘officers of the courts.

Goldfarb v. Virginia State Bar, 421 U.S. 773, 792, 95 S. Ct. 2004, 2016, 44 L. Ed. 2d 572 (1975).

Accordingly, a licensed attorney like Richard Gay has the authority and is in a position to address such matters as a report of a stalking violation of a Personal Protection Order.

At a minimum, a whistleblower would be justified in assuming that an attorney involved in the PPO proceeding was an appropriate individual to report a suspected violation of the law regarding the PPO. To conclude that making such an assumption was not a protected activity would result in the creation of a barrier.

In fact, the Plaintiff testified that she had also contacted law enforcement with regards to a PPO violation and was told by law enforcement that they could not help her and that she needed to contact her attorney:

- Q. Okay.
- A. And I also contacted the police station at one point, and they told me that I needed to contact my attorney, not them.
- Q. When did you contact the police?
- A. I filed a police report with the City of Alma, I'm Not sure on the exact date, it was during the phone calls.
- Q. But you're talking about this time frame between December 2012 and January to 2013?
- A. I'm talking about the time frame in 2012 and 2013, yes. I'm not going to say specifically the 19th to the -- of December to the 14th of January, because I can't remember the exact dates.
- Q. Which is fine.
- A. But in those months, November, December and January.
- Q. So within those months, you also called the police --
- A. Yes.
- Q. -- you filed --
- A. I went to the police station and filed a report, or tried to file a report, and they told me I needed to contact my attorney and not them.

(Exhibit 3 – Plaintiff's Deposition pg. 37-38).

As illustrated by the above-mentioned testimony, the statements made to her by law enforcement left her with the understanding that law enforcement likewise thought that it was an attorney like Richard Gay that had the authority to address the issue rather than their office.

III. EVEN THOUGH THERE CAN BE NO DISPUTE THAT PLAINTIFF MADE A CHARGE TO HER ATTORNEY, THERE IS NO STATUTORY REQUIREMENT THAT THE EMPLOYEE SPECIFICALLY INTEND TO MAKE A CHARGE OF A VIOLATION OR SUSPECTED VIOLATION OF LAW AGAINST ANOTHER.

The Defendant does not dispute that Plaintiff knowingly made a report to attorney Richard Gay of a violation of the Personal Protective Order:

In addition, McNeill-Marks told Whitman the following about her conversation with Gay: (1) *she told Gay that Fields was at the Medical Center in violation of the PPO*; (2) she told Gay that Fields was "really sick and the rumor is that she might not live," and (3) she asked Gay not to serve Fields with the PPO. (McNeill-Marks 121-122, 133-134; Whitman 8-9; Whitman Dep. Ex. 4) (Emphasis Added by Plaintiff).

(Exhibit 4 - Defendant's COA Brief on Appeal Excerpt pg. 10).

McNeill-Marks asserts that she engaged in "protected activity" by virtue of her telephone conversation with her private attorney, Gay, *in which she told Gay that she believed that Fields was in violation of the PPO by being present at Gratiot*. (Complaint ¶¶ 34, 35) (Emphasis Added by Plaintiff).

(Exhibit 4 - Defendant's COA Brief on Appeal Excerpt pg. 17).¹

The Personal Protective Order specifically prohibited Ms. Fields from engaging in stalking as defined by MCL § 750.411h and MCL § 750.411i, which includes, in part, the following:

- Following or appearing within sight of the petitioner;
- Appearing at the workplace of the petitioner;
- Approaching or confronting the petitioner in a public place or on

¹ As noted by the Court of Appeals the PPO violation described by the Plaintiff to attorney Richard Gay would constitute stalking. McNeil-Marks v. Midmichigan Med. Ctr.-Gratiot, 316 Mich. App. 1, 18–21, 891 N.W.2d 528, 537–38 (2016).

- private property; and
- Sending communications to the petitioner.

(Exhibit 5 - Personal Protective Order).

Even though the Plaintiff informed attorney Richard Gay of the PPO violation, the motivation of the whistleblower is irrelevant as previously addressed by this Court:

Rather, the plain language of MCL 15.362 controls, and we clarify that a plaintiff's motivation is not relevant to the issue whether a plaintiff has engaged in protected activity and that proof of primary motivation is not a prerequisite to bringing a claim.

Whitman v. City of Burton, 493 Mich. 303, 306, 831 N.W.2d 223, 226 (2013).

In the present case, there can be no dispute that the Plaintiff reported a violation of a personal protective order.

RELIEF SOUGHT

For the reasons as set forth more fully above, the Plaintiff/Appellee again respectfully requests that this Honorable Court deny Defendant's application for leave to appeal.

In the alternative, the Plaintiff requests that the Court accept the application so that the Plaintiff is afforded an opportunity to further set forth her position in opposition to Defendant's application.

Furthermore, the Plaintiff raised additional grounds for reversal to the Court of Appeals which the Court of Appeals made no rulings upon in light of the fact that it had already concluded that a report to the attorney was sufficient to constitute a

protected activity under the WPA. Likewise, the Court of Appeals affirmed the dismissal of the public policy cause of action in light of its decision that Plaintiff's activities were covered by and preempted by the WPA. A reversal of the Court of Appeals by this Court with regards to the WPA will necessitate further deliberations as to the additional grounds raised by the Plaintiff.

Respectfully Submitted,

THE MASTROMARCO FIRM

Dated: August 18, 2017

By: /s/Russell C. Babcock
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PROOF OF SERVICE

I hereby certify that on **August 18, 2017**, I presented the Plaintiff/Appellee's Supplemental Brief to the Michigan Supreme Court for filing and uploading to the Electronic Filing system which will send notification of such filing to the following: SARAH K. WILLEY an ECF participant. I hereby certify that I have mailed by United States Postal Service the document to the following non-ECF participants: N/A

THE MASTROMARCO FIRM

Dated: August 18, 2017

s/Russell C. Babcock

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRATIOT

TAMMY MCNEIL-MARKS,

Plaintiff,

-vs-

The Honorable
Randy L. Tahvonen

MIDMICHIGAN MEDICAL
CENTER-GRATIOT,

Case No.
2014-11876-NZ

Defendant.

DEPOSITION OF BRENDA WHITMAN

Taken by the Plaintiff on the 18th day of
September, 2014 at MidMichigan Medical Center, 300 East
Warwick Drive Alma, Michigan at 1:02 p.m.

APPEARANCES:

For the Plaintiff: MR. KEVIN J. KELLY (P74546)
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1024 North Michigan Avenue
Saginaw, Michigan 48602
(989) 752-1414

For the Defendant: SARAH K. WILLEY, Esq. (P57376)
Miller Johnson
100 West Michigan Avenue, Suite 200
Kalamazoo, Michigan 49007
(269) 226-2957

Also present: Lorie Mault

Reported by: Robin Alvis Doan, CSR 5650
Tri-City Court Reporters, Inc.
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1 A. That I heard she had some complaints, I probably didn't
2 use that word and to let her, let me know what had
3 happened. And so she proceeded to tell me that she felt
4 Tammy McNeil-Marks accessed her record somehow
5 electronically is the patient's thought. And that she
6 called her lawyer and had the papers served and the
7 patient was very upset with that.

8 Q. Do you know if anybody else was present during the
9 conversation?

10 A. No one else was present, no.

11 Q. Okay. Did you have any response to --

12 A. I also asked her if she had seen Tammy in the hall and
13 she indicated she had seen Tammy in the hall. I don't,
14 well, before the PPO was served.

15 Q. Why did you ask that question?

16 A. Because I met with Tammy before I met with the
17 patient.

18 Q. When did you -- same day?

19 A. Yes.

20 Q. Let's go to that real quick. So you sat down with
21 Tammy?

22 A. Yes.

23 Q. What do you recall from that conversation?

24 A. Tammy was concerned, she indicated that she had had a
25 PPO against this patient for several years. And that it

1 had expired or sounded like it had expired and they were
2 looking to reinstate that. She shared with me concerns
3 of the patient threatening her through the holidays, at
4 a funeral and I can't remember, but she shared concerns
5 of the patient's threats.

6 And that Tammy had saw her in the hall the day
7 before. The patient was on a gurney or a stretcher in a
8 gown and the patient actually addressed her first, said
9 hi Tammy or something. And, and they shared some brief
10 conversation in the hall and Tammy was concerned and
11 upset with that.

12 That the patient wasn't supposed to talk to her or
13 approach her and she thought there would be trouble.
14 Tammy did tell me that she did call her lawyer. And the
15 lawyer conversation she did indicate that the lawyer had
16 wanted, asked Tammy if he could serve PP -- is it PPO
17 orders, right?

18 Q. Yes.

19 A. And Tammy asked him not to. And so Tammy was surprised
20 that they, they got to the patient I guess, so.

21 Q. And did she, you had mentioned that Tammy had related
22 that the patient was not supposed to approach her?

23 A. Correct.

24 Q. Now, do you have any familiarity with what a PPO is?

25 A. From a layman's, yeah. That there's a protection order

1 loop of things.

2 Q. Did she have any reaction to what you were informing her
3 about?

4 A. Just that it's a serious allegation and we'll have to
5 make sure that we investigate that.

6 Q. And then at that point, it sounded like I might have cut
7 you off in asking questions about Robin, did you talk to
8 anybody else?

9 A. I think Theresa Baily her manager to see what her
10 knowledge of any of this was also.

11 Q. And do you recall any of your conversations with
12 Theresa?

13 A. Theresa indicated that Tammy shared with her that she
14 called her lawyer that day before too, that actually she
15 was involved with it on the 14th. Before I knew
16 anything about it or the patient complaint that she had
17 told Theresa about calling her lawyer.

18 Q. Anything else that you can recall or is that pretty much
19 it?

20 A. That's all.

21 Q. Did you talk to anybody else apart from Theresa and
22 Robin?

23 A. Not that I can think of.

24 Q. And then what, I mean what, in your involvement in this
25 situation what's the next event that happens?

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRATIOT

TAMMY MCNEIL-MARKS,

Plaintiff,

-vs-

The Honorable
Randy L. Tahvonen

MIDMICHIGAN MEDICAL
CENTER-GRATIOT,

Case No.
2014-11876-NZ

Defendant.

DEPOSITION OF SUZANNE M. BROUDBECK

Taken by the Plaintiff on the 18th day of
September, 2014 at MidMichigan Medical Center, 300 East
Warwick Drive Alma, Michigan at 2:37 p.m.

APPEARANCES:

For the Plaintiff: MR. KEVIN J. KELLY (P74546)
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For the Defendant: SARAH K. WILLEY, Esq. (P57376)
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Also present: Lorie Mault

Reported by: Robin Alvis Doan, CSR 5650
Tri-City Court Reporters, Inc.
(989) 792-4712



1 privilege.

2 MR. KELLY: Yes it is.

3 MS. WILLEY: Don't answer that one.

4 MR. KELLY: I'll retract the question, my
5 apologies.

6 Q. Did you have any conversations with Tammy about a court
7 proceeding for the PPO?

8 A. No.

9 Q. Did Tammy or did you ever learn that Tammy was scheduled
10 to go to court regarding other violations of the PPO?

11 A. No.

12 Q. Did you ever tell Tammy that she couldn't testify about
13 the protected health information?

14 A. No.

15 Q. Would that be a violation of HIPAA in your opinion as
16 the privacy officer of the policies and procedures for
17 Tammy to testify in open court that Ms. Fields
18 approached her at the hospital?

19 MS. WILLEY: Objection, lack of foundation.
20 If you know the answer you can answer it.

21 A. No, I wouldn't know that answer.

22 Q. Now, after you talked with Tammy did you have further
23 discussion with Lisa and Brenda about the situation?

24 A. I gave them my conclusions.

25 Q. What were your conclusions?

1 A. That protected health information and our policy had
2 been violated because she did disclose that the patient
3 was here at the hospital.

4 Q. Okay. And at anytime, now, when you say that she
5 disclosed protected health information what was the
6 protected health information that was disclosed?

7 A. That the patient was here at the hospital.

8 Q. And do you know what Tammy told her attorney?

9 A. She told him not to serve the PPO, PPO at the
10 hospital.

11 Q. And what is the protected health information?

12 A. It is a violation of our policies and procedures to
13 divulge that someone is a patient here at the hospital.

14 Q. But I could be served with a PPO right now, right, if
15 somebody knew I was here they could walk in here and
16 serve me?

17 A. Yes.

18 Q. And if, let's say you know she says or the court
19 reporter calls up her friend and says don't serve the
20 PPO against Kevin it would be really embarrassing, I'm
21 working right now. That's not protected health
22 information just because I'm in the hospital, right?

23 A. You're correct.

24 Q. So asking someone to serve a PPO at a hospital does not
25 mean that the person who's being served is a patient

1 necessarily does it?

2 A. That's two questions, I'm sorry you have to repeat it
3 for me.

4 Q. Okay. Saying that or making the statement I told him
5 not to serve the PPO while she's at the hospital does
6 not necessarily mean that the person who is going to be
7 served with the PPO is a patient does it?

8 A. That would be a reasonable assumption that they are a
9 patient because otherwise your time here would be very
10 brief and the fact that somebody would have to travel
11 here to serve it would be...

12 Q. Do you know who attorney Richard Gay is?

13 A. Yes I do.

14 Q. His office is pretty close to here isn't it?

15 A. Yes.

16 Q. And it wouldn't be too hard if you found, saw somebody
17 walk in the lobby hey come serve this person they just
18 walked inside?

19 MS. WILLEY: Objection, calls for
20 speculation.

21 A. I wouldn't know where Richard Gay would be in the
22 community at that time.

23 Q. Okay.

24 A. So.

25 Q. So when you say it's a reasonable assumption is it

1 reasonable because you don't know where he would be or
2 what the facts were do you?

3 MS. WILLEY: Objection, argumentative.

4 A. You'll have to repeat the question.

5 Q. Okay. You had testified earlier I believe, just a few
6 moments ago, that it would be a reasonable assumption
7 that it would be a patient?

8 A. Yes.

9 Q. Because they'd have a very brief stay here if they were
10 a visitor?

11 A. Correct.

12 Q. And you said, well, and you just said well I don't know
13 where Mr. Gay would be in the community. And I'm sure
14 that would be true whoever the process server was
15 because, if they could get here in time. It's more
16 reasonable for me to think that she must have been a
17 patient then, right?

18 A. Correct.

19 Q. But if you don't know all the factors about where
20 Mr. Gay was or where the process server was, it depends
21 on the circumstances; right?

22 A. I suppose, yes.

23 Q. And do you know all the circumstances as to how
24 Ms. Fields got served?

25 A. No.

1 Q. Did you ever hear anybody make any comments about
2 Mr. Gay's secretary visiting a patient on 2 West?

3 A. That came up at my interview with Tammy McNeil-Marks;
4 however, she never mentioned that to me in the
5 voicemail or in any other circumstance until that time.

6 Q. What do you recall Tammy telling you about that?

7 A. She stated that a secretary of Mr. Gay's was here in the
8 building, noted that the patient was here and then
9 that's how the process server knew to come here.
10 However that was not congruent to me with what Tammy
11 left on my voicemail the day after the event
12 occurred.

13 Q. What was the inconsistency?

14 A. That she told my lawyer not to serve the PPO, but he did
15 it anyway.

16 Q. Do you know what conversations Mr. Gay had with his
17 secretary?

18 MS. WILLEY: Objection --

19 A. No.

20 MS. WILLEY: Objection, hearsay.

21 A. No.

22 Q. So you don't know if there is an inconsistency or not do
23 you?

24 A. No.

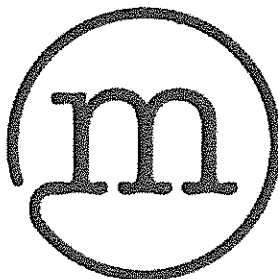
25 Q. So there's nothing in any of the documents that you're

*TAMMY McNEILL-MARKS v.
MIDMICHIGAN MEDICAL CENTER-GRATIOT*

TAMMY McNEILL-MARKS

June 26, 2014

*Moretti Group
471 W. South Street
Suite 41B
Kalamazoo, MI 49007
800-536-0804*



Original File 062614TM.TXT
Min-U-Script® with Word Index



Page 37

1 A. I contacted my attorney.
2 Q. And who was that? Who's your attorney?
3 A. Richard Gay.
4 Q. And to be clear, that's not the attorney who's
5 representing you in this lawsuit?
6 A. No.
7 Q. Okay.
8 A. And I also contacted the police station at one point, and
9 they told me that I needed to contact my attorney, not
10 them.
11 Q. When did you contact the police?
12 A. I filed a police report with the City of Alma, I'm Not
13 sure on the exact date, it was during the phone calls.
14 Q. But you're talking about this time frame between
15 December 2012 and January to 2013?
16 A. I'm talking about the time frame in 2012 and 2013, yes.
17 I'm not going to say specifically the 19th to the -- of
18 December to the 14th of January, because I can't remember
19 the exact dates.
20 Q. Which is fine.
21 A. But in those months, November, December and January.
22 Q. So within those months, you also called the police --
23 A. Yes.
24 Q. -- you filed --
25 A. I went to the police station and filed a report, or tried

Page 38

1 to file a report, and they told me I needed to contact my
2 attorney and not them.
3 Q. Did they tell you why you needed to contact your attorney
4 rather than filing a police report?
5 A. Apparently, they did not have her in the system as having
6 been served, and I can't think of the name of the system,
7 but it wasn't in this system, and so I needed to contact
8 him and find out if she had actually been served, which
9 she had been but he had not... or it had not got put into
10 the computer properly for some reason.
11 Q. And I assume what they were saying is if she hadn't been
12 served, then the police couldn't take affirmative action
13 in that regard?
14 A. I'm assuming that, but I don't want to assume.
15 Q. Okay.
16 A. They just told me to talk to my attorney.
17 Q. And did you contact your attorney?
18 A. I left the police station and went straight to his office
19 three blocks away.
20 Q. Well, that's convenient.
21 A. Yes, it was.
22 Q. Did your attorney then take some action with the court,
23 if you know?
24 A. I believe so. I don't know, but I believe -- I don't
25 know if it was the court, but he did make sure that that

Page 39

1 had gotten entered into the system properly then after
2 that.
3 Q. Did you directly contact the court in any way?
4 A. I was dealing with my attorney. He's my officer of the
5 court.
6 Q. I'm handing you what's been marked as Exhibit 5.
7 (Exhibit No. 5 marked.)
8 A. Thank you.
9 Q. I'll give you a few minutes to look through that.
10 A. Okay.
11 Q. Let's look first at the first two pages are a motion to
12 extend the personal protection order; do you see that?
13 A. Uh-huh.
14 Q. Is that something that was prepared by your attorney?
15 A. Yes.
16 Q. Mr. Gay?
17 A. Yes.
18 Q. Did you talk to him about filing that motion?
19 A. Yes.
20 Q. Okay. Did you ask him to file that motion?
21 MR. KELLY: Let me just object to you're
22 starting getting into their attorney-client privilege
23 with Gay about discussions they've had.
24 MS. WILLEY: You've listed him as a witness on
25 your list. I think you're waiving the privilege.

Page 40

1 MR. KELLY: I'm just going to object. I don't
2 think it's that... you know, I think you can get to it by
3 asking it a different way, but I'm going to make my
4 objection.
5 BY MS. WILLEY:
6 Q. Why was this motion filed?
7 A. Because she was making the harassing phone calls.
8 Q. She was continuing to make them at that point?
9 A. No, these are the ones, that was in response to the same
10 ones, the November and December ones.
11 Q. Oh, I see. When you, before when you referenced she sent
12 you text messages --
13 A. Uh-huh.
14 Q. -- to see the kids, you think that might have been in
15 November of 2013?
16 A. November and December, yes. There's more than what's
17 listed on this petition. It's just these are the first
18 ones listed.
19 Q. And you asked your attorney to file a motion to extend
20 the PPO?
21 A. Yes.
22 Q. Did you read this motion before it was filed?
23 A. No.
24 Q. Do you see the third page is the petition for the PPO?
25 A. Okay.

Whitman spoke with McNeill-Marks first. (McNeill-Marks 121; Whitman Dep. Ex. 4) There is no dispute that McNeill-Marks told Whitman that McNeill-Marks had a PPO against Fields and that Fields "should not be a patient at the hospital." (McNeill-Marks 121-122, 133-134; Whitman 8-9; Whitman Dep. Ex. 4) In addition, McNeill-Marks told Whitman the following about her conversation with Gay: (1) she told Gay that Fields was at the Medical Center in violation of the PPO; (2) she told Gay that Fields was "really sick and the rumor is that she might not live," and (3) she asked Gay not to serve Fields with the PPO. (McNeill-Marks 121-122, 133-134; Whitman 8-9; Whitman Dep. Ex. 4) Based on McNeill-Marks's statements, Whitman understood that McNeill-Marks told Gay that Fields was a patient at Gratiot but asked Gay not to serve Fields with the PPO at the Medical Center. (Whitman 10) McNeill-Marks did not express concern to Whitman that Fields remained a patient in the ICU or ask whether Fields could be transferred to a different medical facility. (Whitman 47)

After Whitman spoke with McNeill-Marks, she interviewed Fields, who confirmed that McNeill-Marks had seen Fields being transported in the hallway and that McNeill-Marks thereafter called Gay, which resulted in the service of the PPO in Fields's ICU room. (Whitman 8; Whitman Dep. Ex. 4) Whitman assured Fields that Fields would continue to receive care at the Medical Center. (Whitman 10-11) Whitman followed up with Freeze via telephone on January 15, 2014. (Whitman 13) Freeze reiterated her concern that Fields's patient privacy rights had been violated, and Whitman again provided assurance that the Medical Center would continue to care for Fields. (Whitman 13-15)

Whitman also spoke with Baily to determine whether Baily had any information regarding the situation. (Whitman 17; Baily 8-9, 15-16, 20-21; Whitman Dep. Ex. 4) Baily reported that on January 13, 2014, McNeill-Marks told Baily that McNeill-Marks had seen



Under the WPA, “protected activity” is defined as (1) reporting a violation of law, rule, or regulation to a public body, (2) being about to report such violation to a public body, or (3) being asked by a public body to participate in an investigation. *Roulston v. Tendercare, Inc.*, 239 Mich 270, 279; 608 NW2d 525 (2000) (citing MCL 15.362).

A. McNeill-Marks's Phone Call To Gay Was Not a Report to a Public Body.

McNeill-Marks asserts that she engaged in "protected activity" by virtue of her telephone conversation with her private attorney, Gay, in which she told Gay that she believed that Fields was in violation of the PPO by being present at Gratiot. (Complaint ¶¶ 34, 35) McNeill-Marks contends that Gay is "public body" as defined by the WPA because he is a member of the State bar and an officer of the court. (Complaint ¶ 35) This is a unique argument that apparently has not been previously considered by Michigan courts. The WPA's definition of "public body" contains six categories, none of which could reasonably be interpreted to include a conversation between a client and his or her private attorney:

(d) “Public body” means all of the following:

(i) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of state government.

(ii) An agency, board, commission, council, member, or employee of the legislative branch of state government.

(iii) A county, city, township, village, intercounty, intercity, or regional governing body, a council, school district, special district, or municipal corporation, or a board, department, commission, council, agency, or any member or employee thereof.

(iv) Any other body which is created by state or local authority or which is primarily funded by or through state or local authority, or any member or employee of that body.

(v) A law enforcement agency or any member or employee of a law enforcement agency.

Approved, SCAO

Original - Court

1st copy - Law enforcement agency (file) (green)
2nd copy - Respondent (blue)3rd copy - Petitioner (pink)
4th copy - Return (yellow)
5th copy - Return (gold/white)STATE OF MICHIGAN
29th JUDICIAL CIRCUIT
GRATIOT COUNTYPERSONAL PROTECTION ORDER
(NONDOMESTIC)
☒ EX PARTECASE NO.
12-1929-PPCourt address: 214 E. CENTER ST., P.O. BOX 437, ITHACA, MI 48847
ORI
MICourt telephone no.
(989) 875-5224

(A)

Petitioner's name

TAMMY M. McNEILL-MARKS

Address and telephone no. where court can reach petitioner

933 W. CENTER ST., ALMA, MI 48801

Respondent's name, address, and telephone no.

MARCIA A. FIELDS

Address and telephone no. where court can reach respondent

4220 N. MISSION, APT. 118, ROSEBUSH, MI 48878

(B)

Full name of respondent (type or print)

MARCIA A. FIELDS

Height
5' 2"Weight
140 LBS

Race *

CAUCASION

Sex *

F

Date of birth or age *

65

Hair color

Eye color

Other identifying information

Driver's license number (if known)

These items must be filed in for the police/sheriff to enter on LEIN; the other items are not required but are helpful.

Date:

Judge:

1. This order is entered ☒ without a hearing. ☐ after hearing.

Bar no.

THE COURT FINDS:

- ☒ 2. A petition requesting an order to restrain conduct prohibited under MCL 750.411h and MCL 750.411i and/or MCL 750.411s has been filed under the authority of MCL 600.2950a.
- ☒ 3. Petitioner requested an ex parte order, which should be entered without notice because irreparable injury, loss, or damage will result from delay required to give notice or notice itself will precipitate adverse action before an order can be issued.
4. Respondent committed the following acts of willful, unconsented contact: (State the reasons for issuance.)

IT IS ORDERED:

5. MARCIA A. FIELDS

Full name of respondent

- ☒ a. stalking as defined under MCL 750.411h and MCL 750.411i, which includes but is not limited to
- ☒ following or appearing within sight of the petitioner.
 - ☒ appearing at the workplace or the residence of the petitioner.
 - ☒ approaching or confronting the petitioner in a public place or on private property.
 - ☒ entering onto or remaining on property owned, leased, or occupied by the petitioner.
 - ☒ sending mail or other communications to the petitioner.
 - ☒ contacting the petitioner by telephone.
 - ☒ placing an object on or delivering an object to property owned, leased, or occupied by the petitioner.
 - ☒ threatening to kill or physically injure the petitioner.
 - ☒ purchasing or possessing a firearm.
 - ☒ other: NO CONTACT WITH PETITIONER'S CHILDREN
- ☒ b. posting a message through the use of any medium of communication, including the Internet or a computer or any electronic medium, pursuant to MCL 750.411e.

6. Violation of this order subjects the respondent to immediate arrest and to the civil and criminal contempt powers of the court. If found guilty, respondent shall be imprisoned for not more than 93 days and may be fined not more than \$500.00.
7. This order is effective when signed, enforceable immediately, and remains in effect until 12/31/2013. This order is enforceable anywhere in this state by any law enforcement agency when signed by a judge, and upon service, may also be enforced by another state, an Indian tribe, or a territory of the United States. If respondent violates this order in a jurisdiction other than this state, respondent is subject to enforcement and penalties of the state, Indian tribe, or United States territory under whose jurisdiction the violation occurred.
8. The court clerk shall file this order with GRATIOT COUNTY SHERIFF, who will enter it into the LEIN.
9. Respondent may file a motion to modify or terminate this order. For ex parte orders, the motion must be filed within 14 days after being served with or receiving actual notice of the order. Forms and instructions are available from the clerk of court.
10. A motion to extend the order must be filed 3 days before the expiration date in item 7, or a new petition must be filed.

Date and time issued

1/14/2013
cc 380 (3/12) PERSONAL PROTECTION ORDER (NONDOMESTIC)

MCL 600.2950a, MCR 3.705, M

FILED
JAN 7 4 2013Carol A. Marks
GRATIOT COUNTY CLERK